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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.
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OFFICE
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EXAMINER

ART UNIT

PAPER NUMBER

DATE MAILED:

10/09/01

Please find below and/or attached an Office communication concerning this application or proceeding.

Commissioner of Patents and Trademarks

Office Action Summary

Application No.

09/423,665

Applicant(s)

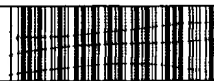
Falconnier

Examiner

Curtis E. Sherrer

Group Art Unit

1761



☒ Responsive to communication(s) filed on Nov 22, 1999

☐ This action is **FINAL**.

☐ Since this application is in condition for allowance except for formal matters, **prosecution as to the merits is closed** in accordance with the practice under *Ex parte Quayle*, 1035 C.D. 11; 453 O.G. 213.

A shortened statutory period for response to this action is set to expire 3 month(s), or thirty days, whichever is longer, from the mailing date of this communication. Failure to respond within the period for response will cause the application to become abandoned. (35 U.S.C. § 133). Extensions of time may be obtained under the provisions of 37 CFR 1.136(a).

Disposition of Claim

☒ Claim(s) 1-19 is/are pending in the applicat

Of the above, claim(s) _____ is/are withdrawn from consideration

☐ Claim(s) _____ is/are allowed.

☒ Claim(s) 1-5 is/are rejected.

☒ Claim(s) 6-19 is/are objected to.

☐ Claims _____ are subject to restriction or election requirement.

Application Papers

☐ See the attached Notice of Draftsperson's Patent Drawing Review, PTO-948.

☐ The drawing(s) filed on _____ is/are objected to by the Examiner.

☐ The proposed drawing correction, filed on _____ is ☐ approved ☐ disapproved.

☐ The specification is objected to by the Examiner.

☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. § 119

☒ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).

☒ All ☐ Some* ☐ None of the CERTIFIED copies of the priority documents have been
☒ received.

☐ received in Application No. (Series Code/Serial Number) _____

☐ received in this national stage application from the International Bureau (PCT Rule 17.2(a)).

*Certified copies not received: _____

☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).

Attachment(s)

☒ Notice of References Cited, PTO-892

☒ Information Disclosure Statement(s), PTO-1449, Paper No(s). 3

☐ Interview Summary, PTO-413

☐ Notice of Draftsperson's Patent Drawing Review, PTO-948

☐ Notice of Informal Patent Application, PTO-152

— SEE OFFICE ACTION ON THE FOLLOWING PAGES —

Part III DETAILED ACTION

Priority

1. Receipt is acknowledged of papers submitted under 35 U.S.C. 119(a)-(d), which papers have been placed of record in the file.

Drawings

2. This application has been filed with informal drawings which are acceptable for examination purposes only. Formal drawings will be required when the application is allowed.

Specification

3. The disclosure is objected to because of the following informalities: The term "anethol" should be spelled --anethole--.

Appropriate correction is required.

4. Claims 1-5 are objected to because of the following informalities: The term "anethol" should be spelled --anethole--. Appropriate correction is required.

Claim Objections

5. Claims 6-19 are objected to under 37 CFR 1.75© as being in improper form because a multiple dependent claim cannot depend from a multiple dependent claim. See MPEP § 608.01(n). Accordingly, the claims 6-19 have not been further treated on the merits.

Claim Rejections - 35 USC § 112

6. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

7. Claims 1-5 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

8. The claims' preambles use the unconventional phrase "characterized in that" rather than "comprises," "consists of," or "consisting essentially of."

9. Claim 1 is indefinite because the scope of the phrases "acceptable in human food" and "apparent solubility" is unknown.

10. Claim 2 is indefinite because it is not clear if the phrase "especially lysolecithins" is a limitation upon the claim.

11. Claim 2 is indefinite because the scope of the phrase "derivatives thereof" is unknown.

12. Claim 5 is indefinite because it is not clear how the phrase "in particular" limits the claim.

Claim Rejections - 35 USC § 103

13. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

14. Claims 1-5 are rejected under 35 U.S.C. 103(a) as being unpatentable over Brun et al. (U.S. Pat. No. 4,944,956).

15. Brun et al teach the production of an alcoholic beverage as claimed (see Abstract) except that the surfactant does not appear to be the claimed phospholipid, but rather a food grade surfactant whose hydrophilic/lipophilic balance is between 12 and 15, whose critical micellar concentration is between 10^{-1} and 10^{-3} , and whose haze point is greater than 30° C for a nonionic surfactant and the Krafft temperature being less than 10° C for an ionic surfactant. While is not clear that any and all phospholipids fall outside the above grouping of characteristics, because the instant application is assigned to the same entity as the assignee of Brun et al, it is assumed that phospholipids are outside of the above characteristics.

16. Lecithin (and derivatives thereof), the preferred phospholipid is a notoriously well known food grade emulsifier, i.e., surfactant. To replace the prior art surfactant with a well known surfactant, such as lecithin, would have been obvious to one of ordinary skill in the art to replace one well known surfactant with another well known surfactant. An express suggestion to

Art Unit: 1761

substitute one equivalent component for another is not necessary to render such substitution obvious. *In re Fout*, 675 F.2d 297, 213 USPQ 532 (CCPA 1982).

17. Finally, Applicants' attention is invited to *In re Levin*, 84 U.S.P.Q. 232 and the cases cited therein, which are considered in point in the fact situation of the instant case, and wherein the Court stated on page 234 as follows:

This court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art of preparing food, no one else ever did the particular thing upon which the applicant asserts his right to a patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients which produces a new, unexpected, and useful function. *In re Benjamin D. White*, 17 C.C.P.A (Patents) 956, 39 F.2d 974, 5 U.S.P.Q. 267; *In re Mason et al.*, 33 C.C.P.A. (Patents) 1144, 156 F.2d 189, 70 U.S.P.Q. 221.

Conclusion

18. No claim is allowed.

19. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Curtis Sherrer whose telephone number is (703) 308-3847. The examiner can normally be reached on Tuesday through Friday from 6:30 to 4:30.

Serial Number: 09/423,665

6

Art Unit: 1761

20. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Gabrielle Brouillette, can be reached on (703)-308-0756. The **fax phone number** for this Group is (703)-305-3602.

21. Any inquiry of a general nature or relating to the status of this application should be directed to the Group receptionist whose telephone number is (703) 308-0661.

A handwritten signature in cursive script, appearing to read 'C. E. Sherrer', written in black ink.

Curtis E. Sherrer
Primary Examiner
September 29, 2000